IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO. 74-6438

EWELL SCOTT, on Behalf of Himself
and All Others Similarly Situated — PETITIONERS

V.

KENTUCKY PAROLE BOARD; LUCILLE ROBUCK,
Chairman of Kentucky Parole Board;
CHARLES WILLIAMSON, NEWT McCRAVEY,
CARL OWSLEY, and GLEN WADE, Members
of Kentucky Parole Board, — RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit filed January 15, 1975, is not yet reported and is printed as pages 1a-2a of petitioner's Appendix. The order of the United States Court of Appeals for the Sixth Circuit filed April 2, 1975, denying the petition for rehearing en banc, is unreported and is printed as Appendix 1 to this Brief in Opposition. The opinion of the United States District Court for the Eastern District of Kentucky is dated March 15, 1974, and is not yet reported and is printed as pages 3a-6a of petitioner's Appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

I. WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT EXTENDS SO FAR AS TO REGULATE THE PROCEDURES FOLLOWED BY A PAROLE BOARD IN DETERMINING WHETHER OR NOT A CORRECTIONAL INSTITUTION INMATE IS SUITED FOR PAROLE RELEASE?

II. WHETHER, ALTHOUGH AN INMATE'S ANTICIPATION OF PAROLE RELEASE MAY BE DETERMINED TO BE PROTECTED BY THE DUE PROCESS CLAUSE, THE VERY NATURE OF THE PAROLE-GRANTING HEARING NONETHELESS MANDATES AGAINST THE REQUIREMENT OF THE TYPE OF ADVERSARY PROCEDURES WHICH PETITIONERS CLAIM TO BE NECESSARY?

STATUTES INVOLVED

The pertinent provisions of Kentucky Revised Statutes 439.330 and 439.340 and the Fourteenth Amendment to the United States Constitution are set forth in the petition at pages 2-4. The respondents accept the petitioners' statement of the case with the exception that the respondents disagree with petitioners' conclusory allegations that the Due Process Clause of the Fourteenth Amendment is applicable to parole-granting procedures.

ARGUMENT

THE PETITION DOES NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS WARRANTING THIS COURT'S EXERCISE OF CERTIORARI JURISDICTION.

At the present time, various United States Courts of Appeals have rendered diverse opinions relative to the applicability of the Due Process Clause of the Fourteenth Amendment to parole release proceedings. It is the respondents' contention that, although there are conflicting opinions, the position adopted by the United States Court of Appeals for the Sixth Circuit in the instant case is the proper interpretation as to the nonapplicability of the Due Process Clause, and certiorari should be denied.

Prior to Morrissey v. Brewer, 408 U.S. 471 (1972), various United States Courts of Appeals rejected due process application to parole-granting procedures. Menechino v. Oswald, 430 F.2d 403 (2nd Cir. 1970) (notice, hearing, transcript, cross-examination, reasons); Mosley v. Ashby, 459 F.2d 477 (3rd Cir. 1972) (reasons); Madden v. New Jersey State Board of Parole, 438 F.2d 1189 (3rd Cir. 1971) (reasons); Tarlton v. Clark, 441 F.2d 384 (5th Cir. 1971), cert. denied, 403 U.S. 934 (1971) (cross-examination); Buchanan v. Clark, 446 F.2d 1379 (5th Cir. 1971) (counsel); Thompkins v. United States Board of Parole, 427 F.2d 222 (5th Cir. 1970) (reasons); Ganz v. Bensinger, 480 F.2d 88 (7th Cir. 1973) (counsel); Barnes v. United States, 445 F.2d 260 (8th Cir. 1971) (counsel); Dorado v. Kerr, 454 F.2d 892 (9th Cir. 1972) (counsel, access to records, record of proceedings, reasons); Schawartzberg v. United States Board of Parole, 399 F.2d 297 (10th Cir. 1968) (counsel). See also Ott v. Ciccone, 326 F.Supp. 609 (M.D.Mo. 1970) (notice).

Since this Court's decision in Morrissey v. Brewer, supra, in addition to the instant case from the United States Court of Appeals for the Sixth Circuit, the United States Courts of Appeals for the Fifth and Seventh Circuits have rejected all due process applicability to parole release proceedings. Scarpa v. United States Board of Parole,[1] 477 F.2d 278 (5th Cir. 1973), vacated on mootness grounds, 414 U.S. 809 (1973); Farries v. United States Board of Parole,[2] 484 F.2d 948 (7th Cir. 1973). See also Wiley v. United States Board of Parole, 380 F.Supp. 1194 (M.D.Pa. 1974); Rankins v. Christian, 376 F.Supp. 1258 (D.V.I. 1973); Barradale v. United States Board of Paroles and Pardons, 362 F.Supp. 338 (M.D.Pa. 1973).

Subsequent to Morrissey v. Brewer, supra, various United States Circuit Courts of Appeals have held due process applies to parole release procedures requiring written reasons for denial of parole. United States, ex rel Johnson, v. Chairman of New York Board of Parole, 500 F.2d 925 (2nd Cir. 1974), vacated on mootness grounds, Regan v. Johnson, 95 S.Ct. 488 (1974); Bradford v. Weinstein, ____F.2d____ (4th Cir. Nov. 22, 1974), rev'g, 357 F.Supp. 1227; Childs v. United States Board of Parole, ____F.2d____ (D.C. Cir. Dec. 19, 1974), aff'g, 371 F.Supp. 1246 (D.D.C. 1973).

1/ Subsequent decisions of the United States Court of Appeals for the Fifth Circuit have stated that Scarpa, supra, has no precedential value in that Circuit. Ridley v. McCall, 496 F.2d 213 (1974); Cook v. Whiteside, 505 F.2d 32 (1974).

2/ Farries, supra, followed Menechino, supra, the latter being partially reversed by U.S., ex rel Johnson, v. Chairman of New York Board of Parole, 500 F.2d 925 (2nd Cir. 1974), vacated on mootness grounds, Regan v. Johnson, 95 S.Ct. 488 (1974).

See also Cooley v. Sigler, 381 F.Supp. 441 (D.Minn. 1974); Craft v. Attorney General of United States, 379 F.Supp. 539 (M.D.Pa. 1974); Candarini v. Attorney General of United States, 369 F.Supp. 1132 (E.D.N.Y. 1974); Johnson v. Heggie, 362 F.Supp. 851 (D.Colo. 1973).

The Due Process Clause of the Fourteenth Amendment does not extend so far as to regulate the procedures followed by a parole board in determining whether or not a correctional institution inmate is suited for parole release. The Fourteenth Amendment requires the safeguards of due process to be applied only where the state is attempting to deprive a citizen of "life, liberty or property." The procedural requirements of the Due Process Clause do not attach themselves to "every conceivable case of government impairment of private interest." Cafeteria and Restaurant Works v. McElroy, 367 U.S. 886, 894 (1961). The interest to be protected must be one of constitutional magnitude. This Court has held that the issue of whether a litigated interest is of such magnitude as to be protected by the Fourteenth Amendment is wholly dependent upon a determination of the extent to which a citizen "will be condemned to suffer a grievous loss" as a result of an unfavorable decision in the proceeding. Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in Goldberg v. Kelley, 397 U.S. 254, 263 (1970); also in Morrissey v. Brewer, supra, at 481.

A "grievous loss" requiring due process protections has been found by this Court where welfare benefits were stopped, Goldberg v. Kelley, supra; where wages were garnisheed, Sniadach v.

Family Finance Corporation, 395 U.S. 337 (1969); where a driver's license was revoked, Bell v. Burson, 402 U.S. 535 (1971); where unemployment compensation was withheld, Sherbert v. Verner, 374 U.S. 398 (1963); where an employee holding a government-created job was fired, Board of Regents v. Roth, 408 U.S. 564 (1972); where an individual's parole was revoked, Morrissey v. Brewer, supra; where an individual's probation was revoked, Gagnon v. Scarpelli, 411 U.S. 778 (1973); good time credits, Wolff v. McDonnell, 418 U.S. 539 (1974); public school student's suspension, Goss v. Lopez, ___U.S.___, 42 L.Ed.2d 725, 95 S.Ct. 729 (1975); and prejudgment garnishment of property, North Georgia Finishing, Inc. v. Di-Chem, Inc., ___U.S.___, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975). In each of the examples above, a presently identifiable and substantial interest, cognizable in law and fact, upon which the individual had come to rely, be it welfare payments, a license, a job, school, or conditional liberty, had been deprived, revoked, terminated, taken away, or otherwise infringed upon, without the benefit of the constitutional protections of the Due Process Clause.

This Court in Morrissey, supra, at 481, stated that: "The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." In determining that due process applied to parole revocation hearings, this Court emphasized the fact that the benefits of gainful employment, enjoyments of a family, social life and "other enduring attachments of normal life" would

be denied the parolee should he lose his parole. After all, the revocation of conditional liberty obviously results in the loss of a "liberty" presently enjoyed by the parolee or the probated--such a "grievous loss" that fundamental procedural safeguards must be implemented in fact-finding hearings held in such cases.

In addition to Morrissey, supra, petitioners contend that Wolff, supra, bolsters their allegation that their interest in parole release is sufficient to require an application of the Fourteenth Amendment. However, Wolff did not involve parole consideration, but did involve the loss of good time credits already accrued under statute--another presently identifiable and substantial interest. Moreover, in holding that prison disciplinary proceedings are subject to basic procedural requirements due to the revocation of good time credit, this Court in Wolff relied heavily upon the Nebraska Revised Statutes, § 83-1, 107 (Supp. 1972), which provided for the allowance and reduction of good time. In Wolff, supra, it is stated:

> ". . . the State itself has not only provided a statutory right to good time credit but also specified that it is to be forfeited only for serious misbehavior. . .the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated."
> 418 U.S. at 557 (emphasis ours)

Thus, Wolff is merely another instance in which this Court has required due process where the individual is to be deprived of

a substantial interest, i.e., accrued good time credit guaranteed to him by a state statute. It is inapposite where, as in the instant case, the prisoner has a mere anticipation of parole, i.e., the possibility of parole which is neither granted nor guaranteed by statute. KRS 439.340 and 439.330 (see pp. 2-3 of Petitioner's Petition).

However, the instant case is clearly distinguishable from all the above mentioned situations where due process has been held applicable. The interest which petitioners seek to have designated as constitutionally protected within the meaning of the Fourteenth Amendment term "liberty" is nothing more than their hope for parole release. A "hope" does not involve a form of liberty cognizable under the "liberty" of the Fourteenth Amendment. In Morrissey, supra, being on parole meant freedom from prison; in Wolff, good time credit meant actual and definite dimunition of sentence; in each instance a form of "liberty" was affected.

Petitioners' interest in a "hope" for parole release is a mere "anticipation" and does not come within the ambit of the Fourteenth Amendment. When parole is denied, the parole board does not increase the inmate's judicially mandated sentence; he still continues to serve his original sentence less statutory good time credits. To attempt to "equate the possibility of conditional freedom with the right to conditional freedom is illogical." Scarpa, supra, at 282.

In Morrissey, supra, being on parole permitted gainful employment, freedom to be with family and friends, and other

enduring attachments of normal life. 408 U.S. 482. In Wolff, supra, there was a right to statutory good time credit which could be taken away only for major misconduct. 418 U.S. 557. In the instant case, KRS 439.340 and 439.330 grant to the Kentucky Parole Board the discretion to release an inmate on parole when the Board in its discretion determines, based upon many intangibles, that the inmate is "able and willing to fulfill the obligations of a law-abiding citizen. KRS 439.340(2). As a matter of law, the decision to grant parole is a creature of discretion and is the responsibility of the parole board, for the statute does not grant to the inmate either parole or the right to be paroled at a specified time.

The United States Court of Appeals for the Second Circuit, in United States, ex rel Johnson, in determining that due process applied to the parole release decision making process, applied the principles of Morrissey, supra. In Childs, supra, and Bradford, supra, the Courts in addition to applying Morrissey, supra, applied the principles of Wolff, supra, in their determination that due process applied. Respondent disagrees with these applications of Morrissey, supra, and Wolff, supra, to the parole release decision making process, because all that an inmate has at any time before the determination to grant parole is made is a mere anticipation of parole release, not a legally identifiable right which is factually cognizable.

The reasoning of the Sixth Circuit in the instant case and that in Scarpa, supra, is extremely sound in not applying Morrissey, supra, or Wolff, supra, because as was stated in Wiley, supra, at 1198-1199:

"Morrissey, however, does not dictate that prisoners looking forward to release on parole be equated with paroles facing loss of their conditional freedom. While a necessary precondition to revocation of parole and reincarceration is a factual finding that a parolee has violated a condition of his parole, the parole release decision is based on a complex of tangible and intangible, of objective and subjective, factors having to do with psychiatry, criminology, psychology, penology and human relations. In Morrissey, the Court, in footnote 8 of its opinion, 408 U.S. 482, 92 S.Ct. 2593, 33 L.Ed.2d 484, intimated that the due process requirements established therein for parole revocation proceedings need not be extended to those still incarcerated seeking parole. The Supreme Court, quoting approvingly from United States ex rel. Bey v. Connecticut State Board of Parole, 2 Cir. 1971, 443 F.2d 1079, 1086, vacated as moot, 1971, 404 U.S. 879, 92 S.Ct. 196, 30 L.Ed.2d 159, a case which sharply distinguishes between parole revocation proceedings and initial parole decision-making stated: 'It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom.' 408 U.S. at 482, n.8, 92 S.Ct. at 2601. This implies at the very least that the Court believes the parole decision-making process does not call for the full panoply of rights due a parolee in a parole revocation proceeding, cf. Wolff v. McDonnell, 1974, ____U.S.____, 94 S.Ct. 2963, 41 L.Ed.2d 935 and may indicate that the Court views the type of interest involved here, i.e., the 'mere anticipation or hope of freedom,' as not being the type of private interest qualifying for due process protection, cf. Board of Regents v. Roth, 1972, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548." (our emphasis)

CONCLUSION

Wherefore, for the reasons above stated, failure of petitioners to present a substantial Federal question, petitioners' petition for writ of certiorari should be denied.

Respectfully submitted,

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